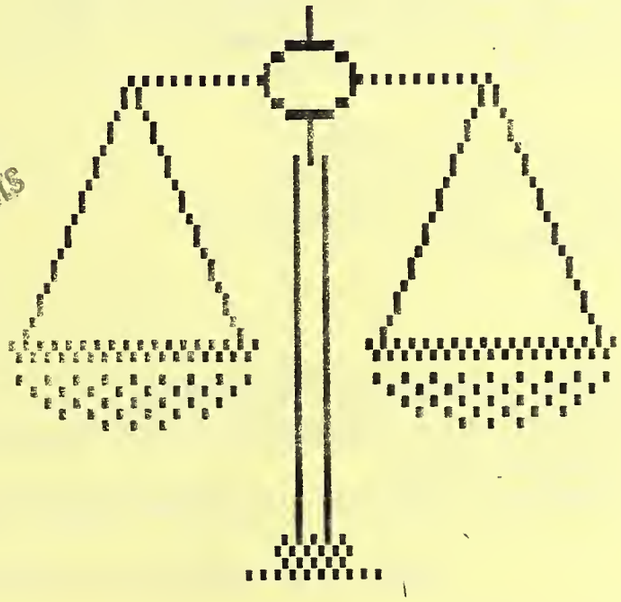
# APPEALS NEWS





**Massachusetts Department of Education**
**Bureau of Special Education Appeals**

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## EDITOR'S NOTE

The Bureau of Special Education Appeals welcomes Kristen "Kris" Reasoner Apgar as it's new Director. Kris comes to the Bureau from the Department's Legal Office where she was the agency's liaison with the Attorney General's office on court appeals of Bureau cases. Kris is highly regarded and respected by her past and present co-workers as well as professionals outside of the Department who know of her abilities.

The Bureau also welcomes Marsha Saylor as a part-time hearing officer, Jane Lavoie as a full-time hearing officer, and Kathleen "Kathy" Bock who was selected as Kris's secretary. Marsha brings extensive experience conducting administrative hearings in the public health and employment fields. She also serves as labor arbitrator. Jane Lavoie joins the Bureau as a full-time hearing officer. Prior to joining the Bureau, Jane served as an attorney with the firm of Hill and Barlow. Before law school, she was a social worker dealing with special needs students and administered a court mediation program operated by Suffolk Probate Court. Kathy comes to us from Stop and Shop. We are fortunate to have acquired her and their loss is definitely the Bureau's gain.

In this issue you will find a full decision on Post-Hearing Findings on Attorney's Fees rendered by Hearing Officer Lindsay Byrne, headnotes on some recent cases, and an article on "Considerations in Mediating Special Education Disputes," by Art Stewart.

Ruby B.

## TABLE OF CONTENTS

## A MESSAGE FROM THE DIRECTOR

This volume of the Appeals News marks the resumption of one of the Bureau's important means for keeping you, our constituents, informed about the issues decided by the Bureau's hearing officers. We hope the Appeals News proves useful to you.

Reviewing the Bureau decisions reported in this volume reveals the broad range of issues addressed by hearing officers. The majority of cases continue to center on the appropriateness of public versus private special education school placements. However, other decisions have focused on such questions as the eligibility of a severely disabled child to receive special education services, where the child's capacity to receive any educational benefit was strongly questioned by the school district (BSEA # 86-0531); programming for hearing impaired students which is consistent with their individual methods for communication (BSEA # 87-0284, 87-1223); the authority of a school district to institute a disciplinary exclusion of a special needs student (BSEA # 88-0960); what constitutes "reasonable accommodation" for a handicapped student who is not in need of special education (BSEA # 88-0493); and the authority of a hearing officer to place a special needs student in an unapproved residential program (BSEA # 85-0212, 86-0567).

Finally, of particular note, the Bureau in response to a request by the Federal District Court in the case of Donaldson v. Lynnfield, C.A.No. 86-3658-WD, has agreed upon request by a party or the reviewing court, to make post-hearing findings pertaining to eligibility for attorney's fees under 20 U.S.C. s. 1415(e)(4). Because of the significance such findings may have for Bureau proceedings, the Post-Hearing Findings in the matter of Mary S., BSEA # 87-0805, has been reproduced in their entirety in this volume.

With the publication of this volume, the Appeals News will again be issued by the Bureau on a regular basis. Those of you who use the Appeals News are encouraged to direct comments on its usefulness to you, or suggestions on how the Appeals News can better serve you, to Ruby Brathwaite, Editor of the Appeals News, at the Bureau of Special Education Appeals.

Kristen Reasoner Apgar
Director of the Bureau of
Special Education Appeals

## ATTORNEY'S FEES CASE

### Case Note #87-0805

Student was 15 year old of low-average intellectual potential attending local high school under 502.2 IEP. Parent challenged program as ineffective citing student's lack of progress. School asserted that student was making progress commensurate with her potential.

At the hearing, school offered additional tutorial, study skill, and remedial instruction as well as individualized selection of regular education classes under a 502.3 IEP. Parent rejected the plan and requested student's placement at the Landmark School.

Hearing Officer found that school's 1987-88 502.3 IEP, as supplemented by additional services offered at the hearing, met the recommendations of expert educational evaluators and constituted the least restrictive, appropriate educational plan for student.

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Neither party appealed the decision. The parents initiated an independent action in Federal Court claiming they were entitled to attorney's fees for pursuing the special education claim at the administrative level. The Court remanded the case to the BSEA for additional findings on that issue. The second decision is reprinted below in its entirety.

BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: MARY S. B.S.E.A. #87-0805

## POST-HEARING FINDINGS ON ATTORNEY'S FEES

This matter comes before the Bureau of Special Education Appeals for post-hearing findings of fact relative to an action for an award of reasonable attorney's fees pursuant to 20 U.S.C. s1415(e)(4) (the Handicapped Children's Protection Act of 1986) ("HCPA"). That action is before the United States District Court, Woodlock, J., C.A. No. 86-3258-WD. Attorneys for the parents and the school committee submitted Proposed Findings of Fact to the Bureau on April 21, 1988.[1]

[1] In Donaldson v. Lynnfield, C.A. No. 86-3658-WD., the Massachusetts Attorney General submitted an amicus brief in which the state acknowledged that, as the administrative agency responsible for the resolution of disputes involving the education of handicapped children, the Bureau had peculiar knowledge and expertise that could be helpful to the District Court in resolving claims for attorney's fees under the HCPA. The Attorney General proposed a procedure where, at the request of either party or the court, the Bureau would make post-decision supplemental findings on: (1) Whether the parents were the prevailing party at the administrative level? (42 U.S.C. s1415 (e)(4)); (2) Whether the school made a written offer of settlement to the parents within 10 days of the commencement of the hearing? (42 U.S.C. s1415(e)(4)(D)(i)); (3) Whether the relief obtained by the parents was more favorable then the settlement offer? (42 U.S.C. s1415(e)(4)(D)(iii)); (4) Whether the parent was substantially justified in rejecting the settlement offer? (42 U.S.C. s1415 (e)(4)(E)); (5) Whether the parent or the school unreasonably protracted the final resolution of the controversy? (42 U.S.C. s1415(e)(4)(F) and (G)). In this matter the parties requested supplemental findings from the Bureau, apparently relying on the offer of the Attorney General in the Donaldson case. While not all the statutory elements are relevant to the resolution of the attorney's fees claim in the Mary S. matter, it is hoped that these findings will aid the court in its deliberations.

Ordinarily, an extensive recitation of the facts found in the original hearing and of the governing law will not be undertaken. It is warranted in this instance, however, since this is the first case to be brought to the Bureau for the purpose of aiding the Court in its determination of appropriate attorney's fees awards under the HCPA. It is hoped that the analysis outlined here will be helpful to future claimants, and will have the effect of avoiding unnecessary litigation in both fora.

**FACTUAL FINDINGS**

During the 1986-1987 school year, Mary S. attended Swampscott High School under a 502.2 Individualized Educational Plan (IEP). She received one period per day of resource room assistance for academic support and language skill remediation. Mary was evaluated by Pamela Putnam of South Shore Children's Hospital in January 1987. Ms. Putnam attended the team meeting held on March 17, 1987, to plan Mary's 1987-1988 school year program. She recommended that Mary receive increased time in the Resource Room, a guarantee of small classes in her regular education subjects, study guides and outlines, and close coordination between the regular and special components of her program. Swampscott teachers agreed with Ms. Putnam's assessment of Mary's learning strengths and weaknesses and testified that implementation of her recommendations would benefit Mary. Nevertheless, Swampscott proposed a 502.2 IEP for the 1987-1988 school year that essentially continued the same type and level of services provided in the 1986-1987 IEP. Mary's parents rejected the proposed 502.2 IEP on April 20, 1987.

Mary's parents formally requested a hearing on the disputed IEP on May 14, 1987. On May 15, 1987, the Bureau sent out notices to the parties that a hearing would be held on June 5, 1987. Mary was evaluated by and accepted for admission to the Landmark School, a private, Ch. 766 approved day school, on May 22nd. By agreement of both parties' attorneys on May 28th, the commencement of the hearing was postponed until June 17th. On June 12, 1987, the Swampscott Public Schools sent a "revised IEP" to Mary's parents, via Mary's brother.

The "revised IEP" (program prototype 502.3) doubled Mary's-time in the Resource Room, and designated the Resource Room teacher, Ms. Guarnieri, the person responsible for preparing and/or collecting study guides and outlines and otherwise coordinating the regular and special education components of Mary's program. The "revised IEP" provided that Mary could take two math courses, as recommended by Ms. Putnam, and noted the importance of small class size to Mary's learning. Mary's parents orally rejected the "revised IEP" at the commencement of the hearing on June 17, 1987.

During three days of hearing on June 17, July 15 and July 17, 1987, Swampscott defended the "revised IEP," virtually abandoning its initial proposal. In addition, Swampscott made several additional guarantees pertaining to regular education class size and level, as well as monitoring and reporting responsibilities that were intended to explain and expand upon the educational program it proposed in the "revised IEP." The parent's expert, Pamela Putnam, reviewed the "revised IEP" and testified that, in essence, it met the

recommendations she had made at the Team meeting in March, and in a letter to the parents in April. The letter, not previously available to the school, was admitted into evidence without objection during Ms. Putnam's testimony. The parents also presented the testimony of Stephen Krom of the Landmark School to support their view that Landmark was an alternate, appropriate placement for Mary. This testimony was unconvincing.

The decision found the "revised IEP," as expanded by the assurances made by Swampscott personnel at the hearing, to be the appropriate educational program for Mary for 1987-1988. The decision made the corrollary finding that the Landmark School placement advocated by the parents was inappropriate and unduly restrictive for Mary.

CONCLUSIONS OF LAW

(1) Whether the parents were the prevailing party in the administrative proceeding? (20 U.S.C. s1415(e)(4)(B)). [2]

There is little case law interpreting the new HCPA. The legislative history of the Act makes it abundantly clear that Congress intended that the standards for awarding fees be generally the same as those under the fee provisions of the 1964 Civil Rights Act and 42 U.S.C. 1988, the Civil Rights Attorney's Fees Awards Act of 1976. See, 1986 U.S. Code Cong. Ad. News, 1799-1807. Therefore judicial interpretations of the term "prevailing parties" under those Acts is

[2] It is noted at the outset that there is no dispute that prevailing parties are entitled to costs and attorney's fees resulting from pursuing a claim at the administrative level. Michael F. v. Cambridge School Department, No. 86-2532-C, slip opinion (D. Mass. March 5, 1987).

considered to be controlling precedent. (See Lana Abu-Labyn v. Palo Alto Unified School District, _____ F. Supp. _____ (N.D. Cal 1987) where the district court relied on federal decisions under 42 U.S.C. 1988 in construing the provisions of the HCPA).

There is a history of liberal interpretation of the attorney's fees acts. The leading case in this circuit construing 42 U.S.C. s1988 is Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). There, Chief Judge Coffin wrote the "plaintiffs may be considered to be prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."

This standard was cited with approval by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), which affirmed the rule that a party need not prevail on every issue to be entitled to an award of attorney's fees, so long as the claims share a common core of fact and related legal concepts with the issue commanding a favorable result. The Court emphasized that meeting Nadeau's "generous formulation" of the prevailing party test only brings a party seeking an award of attorney's fees across the statutory threshold. It remains for the district court to determine what fee is "reasonable." Hensley v. Eckerhart, supra at 429.

The court in Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978) established two tests for determining whether a plaintiff in a civil rights action "prevailed" within the meaning of attorney's fees statutes: the "merits" test and the "catalyst" test. These tests have been applied to disputed attorney's fees claims in an unbroken line in this circuit. See e.g. Exeter West Greenwich

Regional School District v. Pontarelli, 788 F. 2d 47 (1st Cir. 1986); Aubin v. Fudala, 782 F. 2d 287 (1st Cir. 1986); Burke v. Guiney, 700 F. 2d 767 (1st Cir. 1982); Lamphere v. Brown, 610 F. 2d 46 (1st Cir. 1979); Denton v. Boilermakers Local 29, 673 F. Supp. 37 (D. Mass. 1982); Rogers v. Motta, 655 F. Supp. 39 (D. Mass. 1987). The tests are readily applied to the facts necessary for determinations under the HCPA, and given the long history of interpretation and use, should be readily anticipated and understood by litigants pursuing awards under the HCPA.

The two Nadeau tests are separate and distinct; satisfying either of them is sufficient to qualify a party as "prevailing." Coalition for Basic Human Needs v. King, 691 F. 2d 597 (1st Cir. 1982). Under the first test, the "merits" test, a party is considered "prevailing" if it succeeds on any significant issue which achieves some of the benefit it sought in bringing the action. Applying that test here, the parents clearly achieved some, though not all, of the benefits they sought in bringing the appeal of their daughter's IEP. They challenged the appropriateness of the proposed 502.2 IEP, and succeeded in demonstrating that it did not provide appropriate special education to the extent that the school virtually withdrew its endorsement of the initial plan.[3] While the hearing officer made no formal finding that the initial 502.2 IEP failed to provide appropriate education, that finding is implicit in the approval of a

[3] Under the Education for the Handicapped Act, 20 U.S.C. 1401 et seq., and M.G.L. c. 71B local public schools must offer a free, appropriate public education to all handicapped students. The schools are responsible for ensuring that the students receive the maximum feasible educational benefit from the plan in the least restrictive environment consistent with that goal. David D. v. Dartmouth, 775 F. 2d 411 (1st Cir. 1985).

much-enhanced educational proposal. The parents sought increased special education services, increased modifications to the regular education components, more appropriate class size and level, and stricter coordination and oversight of Mary's program. They proved these elements to be necessary for an appropriate educational program for Mary. All were ultimately ordered in the Bureau decision.

While the parents were not successful in their bid for a private special education school placement for Mary, their arguments in favor of the Landmark placement rested on a "core of facts and related legal theories," common to the issues on which they were successful. -Aubin v. Fudala, 782 F. 2d (1st Cir. 1986). In order to win either increased services within the public school, or a 502.5 placement at Landmark, the parents needed to prove that the services, in type and/or amount and/or setting, originally offered in the 502.2 IEP were not appropriately tailored to provide maximum feasible educational benefit to Mary.

Thus, the parents prevailed on the one issue central to any special education appeal: obtaining the educational program that ensures the maximum feasible benefit to the student in the least restrictive setting consistent with that goal. Furthermore, the benefits achieved, while not all that the parents had requested, were substantial. The hearing resulted in a doubling of special education services with related modifications and coordination services. These services had first been requested during the March IEP meeting. They were not offered until after the Bureau's appeals process had been initiated. More importantly, the hearing resulted in an appropriate education plan for Mary, where none existed before, in itself the primary goal and benefit of state and federal special education laws.

Thus, I find that the parents meet the "merits" test, outlined in Nadeau and explained in later cases, as the "prevailing party" in BSEA Case #87-0805.

The parents could also achieve "prevailing party" status under Nadeau's second test, if necessary. The "catalyst test" applies to plaintiffs who have succeeded in obtaining favorable results because of the filing of their claim, but have not had a final judgment on the merits entered in their favor. Nadeau, supra, at 279. Under this test the plaintiffs must show that the suit and their attorney's efforts were a necessary and important factor in achieving an end result favorable to them, and that the claim was not frivolous, unreasonable, or groundless. Thus, if one accepts Swampscott's position that the parents did not succeed in securing a favorable final judgment because the BSEA decision did not award the parents their requested relief at the Landmark School, they would still be found to be prevailing parties under this test. As explained above, the result achieved in the BSEA appeal was substantially favorable to the parents' position. It can be inferred that this result was obtained largely through the filing of the appeal and the appearance of counsel, since the school had notice of the parents' wishes three months before the hearing and there was no showing that the school was prepared to modify its position until, at best, five days before the hearing. Thus, I find the filing of the appeal, and the efforts of parents' counsel in prosecuting it, to be necessary and important factors in achieving favorable results for the parents. The claim was not frivolous, unreasonable or groundless, since the parents secured substantially the relief requested.

(2.) (a) Whether the school proferred a written offer of settlement

to the parents? (42 U.S.C. s1415(e)(4)(D)).

Both parties characterize the "revised IEP" as a written settlement offer. Clearly it was not a true IEP, as it does not meet any of the state or federal regulatory requirements for such a document. [4] Yet, it is difficult to find the earmarks of a traditional settlement offer in the document. It was not forwarded to the parent's attorney, even though the school was aware that the parents were represented by counsel. (See discussion below.) There was no advice to the parents as to the consequences of accepting the proposal, nor were there reservations of rights on the school's part contingent upon the parents' acceptance. Nevertheless, the "revised IEP" meets the parties definitions of "settlement offer" in the context of this case, and therefore it will be considered to have been a written offer of settlement as required by 42 U.S.C. s1415(E)(4)(D).

(2.) (b) Whether the settlement offer was made more than ten days before the commencement of the hearing? (42 U.S.C. s1415(e)(D)(i)). [5]

[4] See, 34 C.F.R. s300.346; 601 C.M.R. s28.00 p322.0.

[5] The statute uses the phrase "in the case of an administrative proceeding, at any time more that ten days before the proceeding begins." The wording has been changed in this question to reflect the special education dispute resolution system in Massachusetts. Parents and school often engage in voluntary mediation in an attempt to resolve differences without a formal hearing. The mediation sessions are arranged and attended by a trained state mediator as part of the special education appeals process. These sessions could be construed as an administrative proceeding. It is the position of the Bureau that Congress did not intend this section to apply to a voluntary mediation session. It is unlikely that Congress sought to require a written settlement offer prior to the parties' first meeting. This would frustrate all attempts at informal, speedy resolutions. The Bureau interprets the phrase "administrative proceeding" to be what is commonly referred to in Massachusetts as the "hearing:" the due process hearing presided over by an impartial hearing officer empowered to make binding findings of fact and conclusions of law based on evidence. Hearings typically last three to four full days, generating the type and amount of expense Congress sought to alleviate through this statute. It is reasonable, therefore, to presume that Congress contemplated reasonable settlements that would avoid lengthy and complex formal administrative "hearings."

The parties agree that the "revised IEP" was hand delivered to the parents on Friday, June 12, 1987. The hearing began Wednesday, June 17th. By generous counting, the offer of settlement was delivered to the parents five days before the hearing began. The offer, therefore, does not meet the statutory requirement that it be made more than ten days before the hearing.

The school argues that it had such short notice of the hearing date of June 17, that it was unable to reasonably prepare a settlement offer more than ten days prior to its start. Administrative records show that by a notice dated May 15, 1987, the parties were alerted that the hearing requested by the parent had been scheduled for June 5th. On May 28, 1987, the lawyers for both parties agreed to continue the starting date for the hearing until June 17th. There was more than a month between the initial notice and the actual commencement of the hearing, and twenty days from the time the school's representative agreed to the June 17th postponement. This was ample time in which to prepare a settlement offer that simply reflected parental requests made at the Team meeting in March, three months earlier.

The school's argument that the offer was timely made due to the lengthy interval between hearing dates is equally without merit. The statute plainly refers to the start of the administrative proceeding,

and does not mention duration. The hearing began on June 17th. It continued on July 15th, and did not "start" again. [6]

(3.) Whether the parents unreasonably protracted the final resolution of the proceeding? (42 U.S.C. s1415(e)(4)(F)(i)).

No. All the evidence in the hearing and the administrative record supports the conclusion that the parents acted with dispatch and eagerly sought an early resolution of the issues raised in this appeals. Although the school argues that the parents' failure to produce Ms. Putnam's April 15th, 1987 letter prior to the hearing was prejudicial, that letter contained no new information or recommendations; it merely reiterated statements made by Ms. Putnam to the Team meeting on March 17, 1987. The production of the letter at the hearing did not constitute an unfair surprise to the school, and did not in any way delay the resolution of the proceeding.

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[6] Given my finding that the school failed to make an offer of settlement that was valid under the terms of the HCPA, there is no need to reach conclusions on most other sections of the statute. I include the following observations solely to aid the Court in the event it wishes to undertake further analysis of the issues presented by the HCPA. The parents did not accept the "revised IEP" within ten days of its offer. (42 U.S.C. s1415(e)(4)(D)(ii)). The parents subsequently obtained a more favorably education plan for their daughter than was set out in the "revised IEP." The hearing decision required the school to make modifications of its program and curriculum beyond those it had offered the parents in the revised IEP, particularly in the area of regular education class size and curriculum support. (42 U.S.C. s1415(e)(4)(D)(iii)). The question of whether the parents were substantially justified in rejecting the settlement offer arises only when a valid settlement offer is tendered and rejected and when the outcome of the hearing is less favorable to the parent than the settlement offer. (42 U.S.C. s1415(e)(4)(E)). Those contingencies are not presented here.

(4) Whether the time spent or legal services furnished were excessive? (42 U.S.C. s1415(e)(4)(F)(iii)). [7]

No. Counsel for the parents acted diligently and competently at all times.

Therefore, the hearing officer finds as follows:

1. The parents were the prevailing parties in this matter under the provisions of 20 U.S.C. s1415(e)(4)).

2. The public school did not make a written offer of settlement within ten days of the commencement of administrative proceedings before the Bureau, as required by 20 U.S.C. s1415 (e)(4)(D)(i).

3. The parents did not unreasonably prolong the final resolution of the dispute.

(s) Lindsay Byrne
Lindsay Byrne
Hearing Officer
May 27, 1988
Date

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[7] The Attorney General in his Brief submitted Sept. 17, 1987, in Donaldson v. Lynnfield, CA. No. 86-3658-WD, stated that the Bureau could not answer this question, as it called for a comparison of different types of services outside of its competence. No such comparison is undertaken here. The Bureau believes it might be helpful to the Court to comment only on the time and services typically expended in pursuing these matters at the hearing level. These comments extend only to behavior observed during the hearing. No judgment regarding other hours or services claimed is intended.

## RECENT CASE NOTES

### BSEA # 85-0026

Issues: Do the multiple needs of this 12 year old child require a residential program?

Profile: Twelve year old boy with congenital encephalopathy and associated quadriparesis and cerebral palsy of unknown etiology. Cognitive functioning in four to five year old rank, with levelling off. Profoundly delayed language skills; communicates through adapted sign language, communications notebook, occasional single word utterance. History of behavioral problems including distractibility, inattention, non-compliance, destruction of property.

Parents' Position:
Child unable to generalize skills. Out of school behavior is unmanageable. Parents can't carry out behavior modification program in home.

School's Position:
Child has made consistent progress in day program, with significant improvement in behavior. Staff of day program all testify that they can meet child's educational needs. Parents seek residential setting for non-educational reasons.

Findings:
1. Child has made progress in day program.
2. Though he certainly requires supervision at all times, he has been able to learn in a 502.5 setting and his out-of-school behavior is not of type or severity to require residential placement for educational reasons. Only one witness recommended 502.6 for educational reasons. However, plan must be amended to provide out-of-school structured sessions to give added practice for ADL, leisure, community and behavioral skills.

### BSEA # 85-0104

Issues:
1. Adequacy of 502.2.
2. Independent Evaluation.

Profile: Twelve year old with moderate to severe learning disabilities in area of written language.

Parents' Position:
For three years child has been insufficiently diagnosed and served by SPS. Carroll School is least restrictive adequate appropriate placement for 1984-85.

School's Position:
502.2 encompasses all suggested special education services. Child has made progress within their programs.

Findings: 502.2 is not adequate because not serviced by personnel trained and certified in special education and has not made such progress in past three years without trained personnel.

Parents entitled to retroactive reimbursement for placement at Carroll School and independent evaluation.

BSEA # 85-0175

Issues: Is the 502.2 IEP proposed by Saugus least restrictive adequate and appropriate plan?
If not, what is?

Profile: Student is a 17 year old with long term emotional and social difficulties who is seriously depressed with underlying boundary disturbances, extremely poor self esteem, poor peer relations, unusual preoccupations and disorganized thoughts. She also has visual processing and visual memory deficits.

Parents' Position:
Student has serious emotional problems, requiring individual and family psychotherapy, highly structured school schedule with extensive resource room help and therapeutic after school program.

School's Position:
Student's academic needs are met with weekly school counselling and resource room support in math.

Findings: Find for parents' position based on student's failure to make school progress commensurate with her capabilities and the severity of her emotional problems based on two independent evaluations.

BSEA # 85-0205

Issues: Whether 502.4(i) IEP proposed by school is adequate to meet needs of extremely withdrawn, passive, language disabled adolescent?

Profile: A severely depressed 15 year old with specific language weaknesses in auditory processing, reading comprehension and written expression. He is at risk for suicide. He had not attended school for three months.

Parents' Position:
Student's depression results from an inability to cope with his language disability. He requires intensive language intervention in a small group of similarly able peers. When his language skills improve, his depression will lift.

School's Position:
School argues that he is emotionally disabled, and that his extreme depression is causing language constriction. School offers an alternative, therapeutic high school setting designed primarily to serve acting out youngsters.

Findings: Both the alternative high school offered by the school, and the private learning disabilities school proposed by the parent, are inadequate and inappropriate. School ordered to locate or develop a 502.4(i) or 502.5 with strong therapeutic component, language based curriculum and remediation, and a gentle environment of similarly able peers.

BSEA # 85-0209

Issues:
1. Does student require extended day programming?
2. Does student require door to door transportation?
3. Does student require expressive therapy?

Profile: 18 year old, severely retarded, Down Syndrome student with limited verbal ability who uses sign augmentatively. Currently in a 502.4 Life Skills program.

Parents' Position:
Extended day services are a necessary adjunct for without same student will not have opportunity to socialize/ interact with peers, hence socialization and communication skills will suffer. Door to door transportation required owing to fact that house is atop a hill. There are no sidewalks, student's reaction time is extremely slow and her gait unsteady. Expressive therapy necessary to encourage communication skills.

School's Position:
1. Extended day program recreationally beneficial but not educationally necessary.
2. Parent should be responsible for walking student down hill to the bus stop.
3. Expressive therapy goals can be addressed in music class.

Findings:
1. Extended day program not educationally necessary adjunct.
2. Expressive therapy required to be delivered by expert in said field.
3. Door to door transportation required in order to give student meaningful opportunity to participate in special education services to which she is entitled.

BSEA # 85-0212

Profile: Twenty-three year old brain injured man, entitled to special education services pursuant to decision of Massachusetts Supreme Judicial Court.

Parents' Position:
1. Student should be immediately placed at proposed program in an IEP which has been accepted by parents and by him.
2. Rate setting and licensing statutes cannot bar his placement in this program.

Department's Position:
Promise of free and appropriate education in federal law incorporates promise of education which meets standards of state education agency. Massachusetts rate setting and licensing statutes operate as a bar to placing student in a program which is unlicensed and for which no rate has been set.

Findings and Conclusions:
1. Promise of free and appropriate education in federal law incorporates promise of education which meets standards of state education agency. However, must look to state law to ascertain those standards.
2. Massachusetts state law requires a program designed and implemented so as to insure maximum feasible benefit and development of handicapped student.
3. There is no argument, or evidence, on record that desired program does not meet this standard.
4. Massachusetts law allows local school districts to provide services, with approval of the Department, in "experimental" programs, or through means "different from those specified in the Regulations."
5. The Department, itself, has agreed to fund student in a different, previous placement which was unlicensed and which has no rate set.
6. The recommendation for New Medico came after an intensive search. Student is currently receiving no special education services. No alternative to New Medico has been proposed.

7. New Medico is the placement embodied in an accepted IEP. School districts are required to implement accepted IEP's immediately. Obviously, this requirement cannot be read in isolation, but there has been no evidence here to support a finding relieving the school district from this responsibility.

BSEA # 85-0216

Issues: Whether the LEA must provide an individual program for a severely multi-handicapped student within the regular high school.

Profile: A profoundly retarded 16 year old who functions on a 2 1/2 year cognitive level across the board. She has physical limitations associated with cerebral palsy and profound bilateral hearing loss. She has participated in substantially separate consortium/collaborative educational placements since age 3.

Parents' Position:
She needs regular contact with age appropriate non-handicapped peers in order to improve her communication and socialization skills. She is entitled to receive her education in her home community under the doctrine of the least restrictive environment. There the LEA must provide an adequate program within her local high school. A collaborative placement in another town is unduly restrictive.

School's Position:
The proposed program, placement in a substantially separate class run by another LEA, adequately meets her special needs. She would not benefit from programming in the regular high school, and would disrupt the other student's education. The high school cannot provide her with the type and intensity of services she needs in order to maintain her skills and learn new ones. Therefore, the proposed program is the least restrictive <u>adequate</u> alternative.

Findings: Child's need for intensive skills training outweighs her need for exposure to non-handicapped peers. The proposed 502.4 program outside of the community adequately meets her basic educational needs except for her need for exposure and integration into her home community. Therefore the school must provide community experience component through an extended day program in order to prepare her to function within her home community in the future.

BSEA # 85-0218

Issues:
1. Is the 1984-85, and 1985-86 IEP calling for placement in a 502.4(i) high school adequate and appropriate to meet needs of 15 year old language disabled student?
2. If not, is a 502.6 placement at the Leland Hall School the least restrictive placement adequate to meet student's needs?

Profile: Student is a fifteen year old 10th grader of average intellectual ability whose reading functions scatter from 2nd to 7th grade level. He has a severe short term memory deficit and a moderate receptive/expressive language disability. He has a history of poor attendance in public school programs and non-compliance with academic assignments.

School's Position:
Student has behavioral and attendance difficulties which interfere with his ability to learn. The alternative program is a highly structured, highly disciplined program which provides small group learning at each student's level. He can make progress in that program if he is invested in attending it.

Findings:
1. Both IEP's are procedurally inadequate.
2. Neither IEP provides components recommended by all evaluators in the record.
3. There is no evidentiary support for his placement in a 502.4(i) designed for behaviorally disordered students.
4. Leland Hall offers an appropriate language based curriculum.
5. A 502.6 placement is unduly restrictive and not supported by expert recommendations.
6. School shall reimburse parents for a 502.5 placement for 1984-85, and develop a 502.5 plan for 1985-86.

BSEA # 85-0320

Issues: Whether a 502.4 diversion and mainstream class adequately meets student's need for therapeutic structure and language remediation?

Profile: Student is a 14 year old emotionally disturbed youth of low-average intelligence. He has severe language disabilities and is functioning at least 4 years below grade level. He has a history of drug abuse. Last year, in the same program he was suspended from school at least thirty times for serious transgressions of school rules. After a drug reaction he was evaluated for 2 months on an inpatient basis at McLean Hospital.

Parents' Position:
Student needs a comprehensive therapeutic program to address his thinking, organizational, behavior and language problems. Due to language deficiencies, interventions must be action-oriented and behavior consistent, thus requiring a 24 hour modification/remediation program.

School's Position:
The 502.4 class adequately addresses his academic deficiencies. He has made progress in the past. His emotional problems are family based and should be addressed through family therapy.

Findings: Student's complicated and intertwined cognitive/emotional/ language deficits can be met only in a 24 hour setting. He has failed to make progress in less restrictive programs, both academically and behaviorally. The proposed 502.4 placement is inadequate.

BSEA # 85-0325

Issues: Whether a 15 year old multi-handicapped student requires a twenty-four hour educational program in order to meet all of his learning needs.

Profile: A 15 year old student who has been placed residentially at the Boston Center for Blind Children for 10 years. He is moderately mentally retarded, legally blind, and hard of hearing. He has spastic quadriplegia but is able to walk independently. He has severe behavior problems. He needs a highly structured program in which methodical instruction in functional living skills and a tightly managed behavior training program are implemented.

Parents' Position:
He requires a twenty-four hour program of structured behavioral management to train him to be attentive to learning. He needs constant practice and reinforcement of activity of daily living skills in order to maintain previously learned skills and acquire new ones. He also needs age peers with similar communication skills for practice and modeling.

School's Position:
He has been institutionalized for 10 years and is now ready for a less restrictive placement. Although he needs twenty-four hour supervision, the residential component of any such program is primarily custodial given his parent's inability to care for him.

Findings: Student needs a 24 hour structured program in order to contain his behavior and make him available for learning. He needs constant practice and reinforcement of activity of daily living skills. He needs exposure to age peers with similar communication styles and abilities in order to practice and model. He can benefit from residential educational services within a group home setting. Lynn must develop a 502.6 IEP incorporating either a day/group home placement, or if none can be located, a private residential school.

BSEA # 85-0340

Issues: 1. Procedural violations regarding graduation.
2. Substantive violations regarding graduation.

Profile: Nineteen year old with a chronic history of neurological and serious psychiatric problems who, at age 18, signed her IEP and completed the requirements for graduation.

Parents' Position:
Parents were denied their rights to notice of their child's proposed graduation. Basic skills testing was improperly waived. Their child substantively should not have received a diploma.

School's Position:
The student was 18 at the time she approved her IEP. At the time of her graduation she had met all of the substantive requirements of a regular education student for graduation.

Findings: Assuming arguendo that there may have been procedural violations, the student substantively was properly graduated.

BSEA # 85-0542

Issues: What is least restrictive adequate and appropriate setting for student for 1985-86?

Profile: 11 year old emotionally disturbed with history of sexual abuse at home. DSS custody since 1983 but living at home in 1984-85 while attending 502.4(i) McKinley School program in Boston. Academically and cognitively functions below average.

DSS Position:
Needs 24 hour educational program. Cannot handle transitions.

School's Position:
502.4(i) is adequate and appropriate. It is structured and therapeutic. Student should be removed from home where abuse took place and which has been unstructured.

Findings: 502.4(i) is adequate and appropriate. Student made progress there and had good relations with staff. Has no major problems transitioning on a daily basis. Should live out of home, which is destractive, but that need is not primarily educational.

BSEA # 85-0564

Facts: 16 year old girl with learning difficulties had been educated pursuant to 502.1 IEP's for four years. Academic deficits persisted despite this intervention as did emotional problems secondary to school failure. The Team was reconvened and a 502.2 IEP proposed. Parents rejected the proposal and placed student in a private day school for learning disabled students in February 1985 where she remains to date.

Issues: Did the proposed IEP conform to federal and state standards for special education programming for this student.

Findings: Retroactive reimbursement granted parents for period 2/85 to date of decision as 502.2 found inappropriate in that it failed to: 1. make adequate provision for counselling, 2. make adequate provision for special services in academic content courses.

Prospectively school ordered to amend IEP so as to include: 1. small supportive special education classes for all academics and 2. weekly individual counselling.

BSEA # 85-0641

Issues: Whether the LEA's proposal to provide a 3 1/2 year old student with a home-based program of physical, occupational, and speech therapy constitutes an offer of an adequate and appropriate education in the least restrictive setting.

Profile: Student is a 3 1/2 year old boy with spina bifida. He has no movement or sensation below his waist, thus preventing development of age appropriate gross motor and toileting skills. He has at least average cognitive potential and is approximately 6 months delayed in language acquisition. The Team recommended provision of home based physical, occupational and speech therapies to prepare him for entry into regular kindergarten.

Parents' Position:
He needs a center-based preschool program in order to address his mobility skills and improve his socialization skills so that he will be ready to enter a regular kindergarten program when he comes of age.

School's Position:
He does not have any cognitive deficits which would prevent him from achieving academic success in a regular kindergarten. Therefore, he does not need the intensive services offered in a preschool classroom. Individual therapies are sufficient to address his needs at this time.

Findings: Student has a substantial disability entitling him to preschool special education services. The mandate for placement in the least restrictive environment applies to 3 and 4 year olds. Home based educational programs, the most restrictive placement contemplated by special education laws, are justified only when a child's severe health restrictions prevent appropriate provision of services outside of the home. There is no evidence in this case that he cannot be educated outside of his home, and cannot be educated with non-handicapped students. Therefore, he is entitled to receive specialized services in as normalized a setting as possible. LEA is ordered to find or develop a 502.8(a) setting in which to provide student appropriate special education services.

BSEA # 85-0692

Facts: 19 year old autistic like student with some inappropriate behaviors seeks placement in a 502.4 program for the developmentally disabled at his neighborhood high school.

LEA recommends placement in a 502.4 program at the TEC Collaborative.

Parents' Position:
The benefits of community based education and vocational experiences are significant. Therefore the program housed at the student's neighborhood high school (while admittedly requiring modification to meet his needs) should be endorsed.

School's Position:
The 502.4 program at the high school is inappropriate for the student in terms of structure, peer group and behavior management.

The collaborative program rather is tailored to his specific needs and in addition offers him the non-segregated setting of a public high school.

Decision: The substantially separate program at the student's local high school, even if modified as urged by parents' witnesses, would not serve to maximize the student's educational development and would in fact represent an educational compromise for this young man.

The collaborative program is found to conform to the standard enunciated by the court in David D.

BSEA # 85-0718

Facts: Fourteen year old student with behavioral, emotional and academic difficulty has spent academic career in 502.4 LAB programs without success. During 1984-85 he participated in 502.4(i) McKinley School. He failed every course with the exception of one, received constant disciplinary sanctions and demonstrated poor attendance.

School committee seeks to continue placement for next year and parent unilaterally placed student in a 502.5 program.

Issues: Did recommendation of public school reflect program which would assure student's maximum possible educational development in the least restrictive environment consistent with that goal?

Holding: Given abysmal performance in program past year continued placement is not upheld. Retroactive reimbursement is granted parent based on her reasonable action in securing for her son a more appropriate placement. Nevertheless, it is found that a more appropriate placement must be secured by the school committee for this student's future attendance.

BSEA # 85-0812

Issues: Whether a 7 year old, behaviorally disordered, student in permanent custody of DSS, requires a residential placement for educational reasons?

Profile: A seven year old severely behaviorally disordered student who was removed from custody of natural parents due to prolonged physical and sexual abuse. DSS placed child in inpatient rehabilitation program at Kennedy Memorial Hospital in July 1984, after one year of regular kindergarten and foster family placement. After a year at Kennedy, child's teachers and educational evaluators recommended a tightly structured, behaviorally oriented residential educational placement for the 1985-86 school year. Brockton proposed a 502.4 placement and requested DSS to place child in a specialized foster care family within

Brockton. DSS rejected the proposed plan and placed child in the residential program at the Walker School.

Parents' Position:
DSS argued that all evaluations indicated that student required a strict behavior modification program on a twenty-four hour basis in order to focus his attention on learning DSS pointed out that he had made significant educational progress at Kennedy's 24 hour program and that Walker offered an appropriate behavioral/educational program.

School's Position:
Brockton argued that student could progress adequately in a structured public school program so long as a trained and competent family placement could be found. It asserted that student's behavior deteriorated after his hospital placement and thus that DSS was responsible for the severity of student's educational needs.

Findings:
1. All expert evidence indicates that student needs a 24 hour behavior management program in order to learn.
2. There is no evidentiary support for Brockton's argument that student could progress in a less restrictive program.
3. The Walker Home provides an educational program that is appropriate to address student's unique, multiple needs.

BSEA # 85-0829

Issues:
1. Whether proposed 502.4 Resource Room program comports with maximum development possible standard.
2. Whether sufficient progress under similar programs was achieved.
3. Whether procedural violations were outcome-determinative.

Profile: An 11 year old learning disabled student who received special services in 502.4 Resource Room placements for the past 4 1/2 years. His academic skills remain from 3 - 4 years below grade levels, and he has serious emotional problems that impact on his ability to learn. His verbal and performance IQ's show a 42 point span. Further, student's poor interactional skills with peers were noted by his teachers throughout his schooling in Lowell, but no recommendation for evaluation was noted.

Parent's Position:
Considering student's failure to achieve satisfactory educational progress, and his worsening emotional/social problems, they requested placement in a 502.5 language based program at Krebs School that provided intensive remediation in compatible groupings with similarly impaired peers provided by trained specialists in a supportive environment.

School's Position:
Since the revised IEP that was presented to the parents for the first time at the hearing increased reading instruction by almost 3 hours weekly, Lowell argued that the plan meets the David D. standard with opportunities for mainstreaming that do not exist in a 502.5 program populated wholly by special needs students. They also claimed that construction of a new classroom would remove any environmental distractions. Lowell did not contest the procedural violations.

Findings: Lowell's revised IEP fails to ensure student's maximum development possible because: 1. The Resource Room teacher was not certified from early 10/85 to 11/13/85, and the new teacher is untested in providing the requisite services that student requires to remediate his severe language deficits; 2. The record was silent whether other students in his reading and math classes were compatible with his severe delays and specific learning disabilities; 3. The current classroom to the date of the hearing was partitioned from a Cambodian speaking class thereby resulting in environmental distractions that were invasive to student's distractibility; and 4. Lowell's failure to hold annual review meetings denied to the parents their right to assess his progress prior to accepting IEP's for 2 years. Krebs School was found to have the requisite services to promote his academic/social/emotional progress commensurate with his potential.

BSEA # 85-0874

Issues: 1. Whether .4 is appropriate.
2. Whether a .6 is needed in order to get maximum benefit.

Profile: A 13 year old student with Proder-Withe Syndrome has IQ of 37. She has shown little progress in skills over 2 years, has deteriorated in behavior and has become obese.

Parent's Position:
The school asserts that her progress is adequate, given her IQ score, that her behavior has recently improved, and that weight loss is not an educational service.

Findings: 1. Student requires a 24 hour program in order to provide maximum opportunity for educational progress. The high degree of structure, consistency, and stimulation, cannot be provided in the home.

2. Weight loss is not an educational need for this child also is not a related service stated under the regulations.

BSEA # 85-0997

Facts: 15 year old boy with chaotic family situation, behavior/emotional needs and mild learning disability.

Academics are 3-5 years behind grade expectations and discipline problems are pervasive.

Participated for many years in the 502.4 continuum without making effective progress. Also, traditional disciplinary sanctions (e.g., detention, frequent suspension) were used by LEA to address acting out in school.

Current IEP proposed continued participation in same program with modifications as follows: (1) delegation of disciplinary responsibility to special education vs. regular education staff, (2) assignment of classroom aide to free up special education teacher on as needed basis to deal with behavioral/emotional needs.

Issues: Does the IEP as proposed by Saugus serve to assure maximum feasible educational development in the least restrictive environment or is a private day school required in order to meet this standard?

Holding: Continued participation in the 502.4 junior high school program, even given the proposed modifications will not effectively serve this student. Given this (1) minimal past progress under the rubric of similar IEP's and (2) negative association vis a vis use of traditional disciplinary sanctions, requires a fresh start in a different age appropriate substantially separate program for students with behavioral, emotional and academic needs.

BSEA # 85-1028

Issues: Whether a 19 year old head injured student requires an academic/vocational/social skills training program specially designed for the needs of head injured students?

Profile: A 19 year old who was seriously injured in a car accident 2 years ago. Since then he has made slow but steady progress in regaining lost academic/language/social skills in a hospital rehabilitation program with 1 hour daily home tutoring. His academic skills now range from 3rd - 5th grade level with language processing and word retrieval deficits. He works extremely slow and methodical. He is highly motivated and wants to go to college.

School's Position:
Student displays academic/language difficulties commonly and successfully addressed through typical learning disabilities programs. He needs to come to terms with his limitations. The Cotting School has a day program which offers small group academics, counseling, cognitive therapy, and vocational programs which are suited to his needs.

Parent's Position:
Student displays academic/language difficulties commonly and successfully addressed through typical learning disabilities programs. He needs to come to terms with his limitations. The Cotting School has a day program which offers small group academics, counseling, cognitive therapy, and vocational programs which are suited to his needs.

Findings:
1. All evidence supports conclusion that student requires specialized interventions designed for head injured students;
2. All evidence supports conclusion that he needs academics/language remediation/vocational preparation/social and activity of daily living training/counseling integrated to comprehensive program.
3. All evidence supports conclusion that he needs a peer group of similarly disabled students in order to learn.
4. The Cotting School does not offer the necessary components of an appropriate educational program for him.
5. The Head Trauman Unit at the Devereux Foundation is the least restrictive educational placement which offers the services and environment necessary to permit student to develop to his maximum potential.

Issues:
1. Severe emotional/behavioral/social problems impeding academic progress.
2. Need for 24 hour highly structured therapeutic residential placement.
3. Impact of unstable family on educational progress.

Profile: A 14 year old adolescent whose emotional/behavioral problems surfaced at the start of his pre-school programs, and have exacerbated throughout his schooling. Almost at the completion of his 5th year in a 502.5 program at the Lakeside School, student's condition decompensated to the point where he was expressing psychotic and violent ideations, he became more explosive, and he was unable to identify any associative feelings. After short stays in summer 1985 at Gaebler and N.E. Memorial Hospital, he was transferred to Bournewood Hospital, a psychiatric facility, where he remained from 8/10/85 to 10/1/85.

Parents' Position:
Considering that after 5 years in a 502.5 program at Lakeside School, student failed to achieve effective educational and emotional/behavioral/social gains, and that his condition in fact worsened in spring 1985, the parent requested a 502.6 highly-structured therapeutic program where all services would be provided in a consistent, integrated and cohesive manner.

School's Position:
Peabody held that student's special educational needs could be met adequately and appropriately in the least restrictive prototype within a 502.5 day program. They contended that his traumatic and unstable home situation was largely accountable for his sporadic and cyclical academic progress. Peabody asserted that the parents' inability to exercise firm limit setting over students' behavior interfered with his educational progress, and was not the responsiblility of Peabody.

Findings: Based on the testimony of all witnesses and compelling documentary evidence (Peabody did not present any witnesses) that student required a 502.6 highly structured therapeutic placement for educational benefits, ordered that Peabody immediately locate and fund a 502.6 program that offers the following characteristics:

1. Small, highly structured classroom settings taught by a certified teacher of moderate special needs, preferably with experience in dealing with adolescents with moderate to severe emotional/behavioral special needs.
2. Consistent and cohesive behavioral modification techniques employing a contract system that is in place around-the-clock.

3. At least weekly 1:1 and group therapy sessions and access to counseling on an as-needed basis.
4. Integrated and coordinated approach between all service providers.
5. Family counseling.

BSEA # 85-1058

Issues:
1. Autism.
2. Cognitive/language therapy.
3. Early childhood program.

Profile: A 3 1/2 year old child who carries the diagnosis of severe infantile autism. Her global deviant delays include: preverbal speech that manifests unintelligible vocalizations severely disturbed affect relationship, minimal eye contact, vertual absence of cognitive development, odd motoric characteristics, lack of ADL skills, and overall functioning level at 9-12 months.

Parents' Position:
They rejected Boston's 502.4 Early Childhood Autism Program because: 1. Since the other children are mostly significantly higher functioning, child could not benefit from role modeling considering that her cognitive development is severely impaired; 2. The primary focus of the program is behavior management rather than cognitive/language stimulation; 3. The program fails to provide a 12-month language therapy component; 4. They requested a 502.5 placement at LCDC where child has already achieved some gains.

School's Position:
Boston argued that the 502.4 Early Childhood Autism Program basically parallels the theoretic orientation in place at LCDC by implementing a cognitive developmental approach assisted by behavior management techniques. The program is augmented by speech, occupational, and physical therapies, and adaptive physical education - all provided in an intergrative, cohesive manner. Home visits by professional educators can be arranged as frequently as requested by the parents to enable the children to generalize learned skills within the home setting, and assist parents in dealing with emerging problems.

Findings: Boston's program fails to provide requisite services because: 1. The primary behavior orientation is inconsistent with student's primary language/cognition needs; 2. Since she would likely be the most seriously handicapped child in the class, she could not derive any significant educational benefits from higher functioning peers; 3. Apparent disregard by the teachers of the importance of constantly stimulating language and cognition; and 4. Absence of services by a language therapist during the 6-week summer component. Ordered immediate placement in the 12-month 502.5 program at LCDC based largely on the constant, consistent, and intergrative manner in which language and cognition are stimulated throughout the school day.

BSEA # 85-1105

Issues: Whether an extended day classroom/vocational program is appropriate for a 16 year old autistic student or whether he requires a residential behavioral/vocational program to benefit to the maximum extent feasible.

Profile: 16 year old autistic student who has been in 502.5 for 9 years. He has plateaued academically at the 2nd grade level. His obsessive behaviors and thoughts interfere with his learning, and these have increased in the past few years. He requires an intensive behavioral/relaxation program to reduce behaviors and encourage learning new skills. The content of the educational program should be vocational to prepare him for supervised work as an adult.

Parents' Postition:
Child requires 24 hour behavioral interventions to reduce obsessive thoughts. He has failed to progress in a highly structured day program. The 502.5 proposed by school lacks the consistency, behavioral structure and oversight, and functional vocational focus. He now needs to prepare for adulthood. BDC, a nonapproved, out of state residential school has the services necessary to address his learning needs.

School's Position:
The proposed classroom teacher is trained and experienced in developing behavior modification programs for autistic students. The class has a functional academic focus which will teach him at this level. The afternoon vocational component is specially designed for special needs students and supervised by a behavioral specialist. He is too high functioning to require residential placement.

Findings: Child requires 24 hour intevention and programming to reduce his obsessive behaviors and permit him to learn communicative and vocational skills commensurate with his average to moderately retarded intellectual potential. Even if a proper behavior program could be implemented in the home, which parents have no duty to program, the proposed program lacks the intergration of vocational goals and consistency of behavioral expectations, the experts agree is necessary in order for him to learn. The BDC offers an appropriately tailored educational program and the school is ordered to seek individual approval for this placement there for 1986-87.

BSEA # 85-1223

Issues: 1. Is the Brookline Integrated Program for Severe Special Needs, a 502.4 placement, reasonably calculated to ensure the student's educational development to the maximum extent feasible in the least restricitive setting in 1985-86?

Profile: A 14 year old autistic student who functions cognitively on a three year level. He is nonverbal and used a communication board in the past. He is sociable, has a short attention span, and benefits from mainstream contact. He needs to learn functional living skills, to improve his communication skills, to orient to his community and to prepare for adulthood.

Parents' Position:
Child has failed to make adequate progress in prior Brookline programs. He needs to learn traditional academic skills and to learn to speak. The BIPSSN program has an inadequate academic focus, inadequate physical education, inadequate music instruction, inadequate emphases on speech development and inadequate mainstreaming. The Higashi School offers all of these components, and after a year there student has made significant progress toward the acquisition of age appropriate skills.

School's Position:
The BIPSSN program is a model for integration of students who need intensive instruction in functional academic and life skills with regular education students. The parents' assessment of child's academic potential is unrealistic. He has made significant progress in the past in less functional curriculums and can be expected to make more gains with the new functional approach, particularly in the area of communication. The Higashi program is not supported by expert evaluations and has not produced significant progress for him.

Findings:
1. The parents' objections to BIPSSN are not supported by the evidence.
2. Expert evaluators have recommended educational programming significantly similar to that offered by BIPSSN.
3. Expert evaluators have specifically recommended against techniques and components in use at Higashi - in particular the traditional academic paper and pencil tasks and the exlusive use of speech as a mode of communication.
4. BIPSSN will assure the maximum development of child's educational potential.
5. BIPSSN is less restrictive than Higashi.
6. The goals and methods of the 1985 and 1986 IEP's are appropriately tailored to student's identified skills and needs.
7. No retroactive reimbursement is available to the parents.

BSEA # 86-0103

Issues:
1. Whether state agencies are providing educational services and therefore are bound by P.L. 94-142 and Ch. 71B.
2. Whether state agencies should be ordered to comply with agreed upon IEP.

Profile: 16 year old severely disturbed intelligent boy is presently at a psychiatric hospital and attends an educational program on the grounds of the hospital when his emotional/behavioral conditions allow him. His program is jointly funded by DYS, DMH, and the LEA. DYS and DMH intend to transfer him to a DMH facility.

Parents' Position:
Any transfer will be devasting for this student's emotional growth. DMH and DYS should be bound by P.L. 94-142 and Ch. 71B and the current placement must be implemented until proper procedures are followed.

School's Position:
School continues to offer the 502.5 prototype program as long as the student is physically and mentally capable.

Findings: DMH and DYS failed to participate in the hearing.

## BSEA # 86-0117

Issues:
1. Whether reimbursement for unilateral placement is appropriate.
2. Whether reimbursement for therapy is appropriate.
3. Whether request is timely.

Profile: 19 year old school phobic student had a history of school programs which did not work. Parents unilaterally placed him in a program. Both parties agreed that parent's school was appropriate and school's IEP was inappropriate.

Parents' Position:
1. They have right to free, appropriate education.
2. They have right to free related services.
3. Any delay was in the interest of negotiation.

School's Position:
1. The delay compromised the parties' ability to prepare for hearing and reimbursement should be denied.
2. The therapy services were not provided in the communication to the school, as agreed upon and should not be paid for by school.

Findings:
1. The parents should be reimbursed. The request for hearing was initially made and the long delay in going to hearing was in the interest of negotiating. The school provided no evidence of school's inability to prepare for hearing.
3. The school was responsible for providing therapist. They should reimburse.

## BSEA # 86-0310

Issues: Is student entitled to compensatory educational services beyond his 22nd birthday? If so, what services?

Profile: Student will be 22 years old in February 1986. Following a history of good schooling, he deteriorated since sixth-seventh grades. His IQ has dropped over the years. He has been educated in out-of-school tutorials since 1978, receiving 38 hours/week during the past year and several months.

Parents' Position:
Student's IEP was three months late; he was denied essential education services, for which he should be compensated by continuation of his entire program for four months; otherwise, because of his learning style, he cannot learn.

School's Position:
School offers to give student the GED training he missed, plus other services (totalling 16 hours per week) through June 1986.

Findings: School's offer more than compensates student for lost services, which were, more in the nature of a minor noncompliance than a denial of essential special education services. Student's program for 38 hours per week demonstrates that he received the essential components of his IEP. Further, there is no dispute in the record that he benefitted from the program, in spite of its lack of GED training since September 1985.

The lateness of the IEP was harmless error, as Greenfield has an on-going obligation to provide the GED training in a prior, still in effect, IEP. Greenfield's acknowledgement of its obligation to provide the GED and the additional hours of services, more than meets its obligations to student.

BSEA # 86-0531

Issues: Does MGL ch. 71B, 20 USC 1401 et seq., require as pre-requisite to entitlement that a student must be able to benefit from educational services provided?

Profile: 19 year old severely brain injured student who has been in what some clinicians have termed "vegetative state" for 15 years - currently in pediatric nursing home.

Parents' Position:
Handicapped/special needs students have absolute entitlement to special education services under federal and state law; demonstrable ability to benefit from or develop as a result of services not a pre-requisite to entitlement.
Even if benefit is required, evidence supports existence of same.

School's Position:
"Benefit" is a contingency to entitlement under both state and federal legislation.

Student in question if unavailable to education cannot benefit from same and therefore is not entitled to receipt of same.

Findings:
1. Benefit is a contingency to entitlement under both federal and state special education legislation/decisional law;
2. Some margin of doubt has been raised re: student's ability to benefit at some level from special education intervention;
3. Given the standard enunciated by the court in David D., doubt must be resolved in favor of student.
4. LEA ordered to provide services for period of 1 year and further ordered to implement an intensive diagnostic and assessment process to gain further data on student's availability to education.

BSEA # 86-0697

Issues: Whether a 502.4 Life Skills class provides the maximum feasible educational benefit to a severely retarded 13 year old who has aggressive behavioral outbursts at home, or whether his educational needs are such that he requires residential programming.

Profile: Child is a 13 year old student with a diagnosis of pervasive developmental delay and a full scale IQ of less than 40. He has made slow, study progress in 3 years in functional academics, activities of daily living, and prevocational skills in the proposed 502.4. He is appropriately behaved in all school and community settings but is unmanageable at home when he becomes aggressive and abusive. He is morbidly obese, requires a medically controlled weight reduction program and medically supervised medication withdrawal.

Parents' Position:
Student requires a twenty-four hour program to teach him to control his behavior in all settings, to increase his generalization skills, and to provide the medical supervision he needs to lose weight and taper off medications.

School's Position:
Student has made slow, steady progress in the acquisition of functional academic, living, and prevocational skills in 3 years in the Life Skills class. His progress has been commensurate with his potential. He has no behavioral problems in class or in school related activities. His poor behavior is confined to the home and is a home problem.

Findings:
1. All experts found the Life Skills class to be appropriately tailored to student's educational needs.
2. Student is making progress in the class commensurate with his cognitive potential.
3. Student behaves appropriately in structured and unstructured situations outside his home.

4. He needs residential treatment for his obesity and medication withdrawal. These are medical needs that do not impede his functioning in school. These medical needs are not suseptible to educational programming.
5. He needs to be removed from home because he is abusive to his family. His home behavior is not related to his educational needs.
6. The IEP meets his identified educational needs in the least restrictive setting. While he needs residential placement immediately it is not for educational reasons. Case is referred to IDT for determination of fiscal and programmatic responsibility.

BSEA # 86-0705

Issues: Whether a 502.2 IEP providing for 2 periods per day of resource room assistance in reading and study skills is appropriate for a seventeen year old who has not attended school in 15 months due to severe depression following a traumatic event?

Profile: Student is a 17 year old mild reading and organizational deficits for which he has received special education assistance since 4th grade. He began to experience excessive absences and declining regular education grades in 9th grade and continued into 10th grade. In the spring of 10th, he was sexually assualted. He went into a serious depression and was unable to attend school. After six months he was hospitalized for suicidal ideation. After discharge he still was unable to attend school and received 45 minutes per day of home tutoring which he attended inconsistently.

Parents' Position:
Child has a chronic depression and anxiety disorder which prevents him from attending school or focusing on learning. He has not received appropriate educational services for 15 months. School did not respond to repeated requests for assistance. He requires behavioral and psychological support in a structured, residential setting in order to overcome his fear and disorganization and help him to focus on learning.

School's Position:
Student's only special education needs are for academic support in reading and study skills. His inability to get out of the house is due to his fear of meeting his assailant in the community. He does not need a residential placement for academic reasons, but for social ones. Therefore, the school is not responsible for funding.

Findings:
1. School has failed to respond appropriately and pursuant to regulations to parent's repeated requests for assistance and student's changing educational profile.
2. His psychological needs are inextricably intertwined with his academic needs. Total educational programming must take combined needs into account. Failure to develop plan to address whole student is procedural and substantive violation of laws.
3. The preponderance of the evidence indicates that a therapeutic residential educational program is the least restricitive, appropriate placement for him for 1986-87.

BSEA # 87-0634

Issues: Whether school is responsible for providing individual and family counseling as part of student's educational program.

Profile: Student is a 14 year old behaviorally disordered student of average intelligence. He is withdrawn and passive and does not participate in any way in school. Achievement tests show him to be at grade level in most areas. He needs consistent, continued behavioral training to awaken his interest in life and his motivation to perform consistent with his potential.

Parents' Position:
All adults who come into contact with student must reinforce the predictable, positive behavioral routine he needs to connect with the world. Without this therapeutic component, which can be implemented within the public school, student is at risk for more restrictive environments. School failed to respond to prior requests, including those from its staff, to add a counseling/behavioral component to child's program. Parents are entitled to reimbursement for expenses for obtaining counselling when the school failed to offer it.

School's Position:
Did not attend hearing.

Finding: Weekly indiviual and biweekly family counseling are essential components of an appropriate plan which will permit student to be educated in the least restrictive setting. Reimbursement ordered. Plan to be evaluated in 2 months.

Issues: Whether school has provided reasonable accommodations to student's handicap as required by Sec. 504?
Whether existence of handicap alone entitles student to special education services.

Profile: Student who is 16 years old, and appropriately grade placed in 11th grade, has an environmental illness which prevents her from entering the science wing of the building. She becomes ill when exposed to chemical fumes. She is achieving at or above grade level academically consistent with her intellectual potential. Due to her handicap, the existence of which is unchallenged, she is unable to attend the regualr 11th grade biology course.

Parents' Position:
Student requires accommodations to her handicap that the school refuses to provide. These include: a closed circuit television/speaker phone transmission of biology lectures and labs; strict enforcement of the no smoking policy; and use of "natural" alternatives to chemical cleaners such as bleach and ammonia. The use of "interactive" TV will permit the student to benefit from the regular curriculum in the "most integrated" setting possible.

School's Position:
School has offered to tutor student in biology in both correspondence and regular texts as well as adapted labs. These are more educationally beneficial than the TV coverage advocated by the parent. TV is inappropriately stigmatizing. Student is making appropriate educational progress under this arrangement. School has undertaken to eliminate and/or reduce the use of chemical cleaners.

Findings:
1. School's offer of biology tutoring is a reasonable accommodation to student's handicap and satisfy Sec. 504's legal standards of nondiscrimination and program accessibility.
2. Student, while handicapped, is making appropriate progress in regular education. She is not entitled to special education services.

BSEA # 88-0960

Issues: Whether student should stay in regular education pending the outcome of appeal (s327).

Profile: 16 year old intelligent student is an underachiever.

Parents' Position:
Student is not a danger to himself or others and should remain in his placement pending the outcome of the appeal. The psychologist's and psychiatrist's test results are not indicative of his psychological condition.

School's Position:
Student is homicidal and/or suicidal and should be hospitalized and/or placed in Arlington School under a diagnostic plan.

Findings: School failed to make a showing that the student was a danger to himself or others and should remain in his regular education program pending a resolution of the case.

# CONSIDERATIONS IN MEDIATING SPECIAL EDUCATION DISPUTES

By

Art Stewart
Coordinator of Mediation
Bureau of Special Education Appeals

## Conflict

If you think about the first word which comes to your mind when you hear the word "conflict," chances are that it is negative in connotation. People tend to associate conflict with problems and in turn, associate problems with people.

We will come back to more about the nature of conflict later. The chief issue here is that our attitudes about it determines our stance toward it; whether we see it as a natural and necessary part of living fully or something to protect ourselves against or to avoid. Does not our sense of options flow from our attitudes?

Our associations with, and tools for, understanding conflict are poorly developed. We need to remind ourselves that conflict is frequently the legitimate outcome of interactions between well-meaning, well-informed people. It may not be the dull thud of trouble knocking, but the whisper of opportunity. It may be a vital sign in relationships.

## Attitudes

Let us consider some prevalent attitudes. Here are some attitudes that people have about institutions and that parents have about schools.

1. The school is composed of a large staff of people who know what they want to do and who have a position.

2. The school has infinite resources.

3. The school is a public monopoly with no burden to listen to and take account of individual needs.

4. The school is legitimate and the staff have legitimate social identities. By contrast, petitioners have discrediting problems and consequently spoiled social identities.

5. The school has some of the trappings of institutions that people see as having some control over their lives. The building is made of more durable building materials than most homes. People who work there speak jargon and have their own experts who work from their own set of facts. The school is designed to handle large numbers of people and human encounters. This leads to a perceived imbalance of scale, a mass effect.

Here is how schools sometimes view parents:

1. They take for granted the school's resources and efforts.

2. They portray only their litany of problems. The existence of a perceived problem will be used to discredit staff and programs.

3. Parents do not understand the constraints on school staff and constantly assume that their discretionary judgement and resources are larger than they are.

4. Parents put more trust in hospital-grown experts than in school-grown experts.

These are some of the attitudes in the background when schools and parents start to identify and negotiate a conflict.

Mediation

What do people in conflict need from a mediator?

1. Voice, a chance to be heard.

2. A chance to feel that they are fair and legitimate people who are experiencing a problem.

3. Help in generating a fresh look at things, a reassessment, help in moving away from a perceived dilemma to viewing it as an issue, capable of resolution.

But people find it hard to acknowledge that their conclusion represents an impasse, a ruled out (at least at the start) solution.

The basic principles of mediation, the hallmarks of the practice, are these:

1. Participation is voluntary, not coerced.

2. The outcome is self-determined. Mediators are active in helping people to seek resolution, but don't impose one.

Why?

Because a good agreement has to develop from and satisfy the parties' best interests, values and aspirations. For example, at one mediation, the public school was offering an 18 year old, developmentally delayed girl a comprehensive curriculum, including continuing drill in basic and unmastered math facts. The parents did not expect their daughter to qualify for graduation within her remaining years of eligibility for services. They simply wanted her to read better than she did. Given this information, the school was able to alter the IEP to focus on reading skills.

3. The mediator is neutral. People need to feel that the mediator is fair, favoring or discriminating against no one. This fact and appearance are essential because the mediator must elicit a tremendous amount of trust. People have to be able to tell the mediator about their values, aspirations, motives, fears, and what they are willing to do in ways that they have not been able to tell each other.

Then, they have to trust him/her when (s)he is out of the room, in caucus with the other side.

4. A paired characteristic is confidentiality. People have to feel that what is said is safe, but uncomfortable topics may be discussed safely and that options may be tentatively considered without weakening one's position or implying commitment or acceptance: in lawyer's terms, so that offers of settlement may be examined. Confidentiality allows a privileged relationship in which feelings may be openly discussed.

Why does mediation work?

Every relationship has two kinds of interests: substantive and relationship. The relationship tends to become tangled in the problem. Positional bargaining puts the relationship and substantive interests in conflict. Finding ways to support people's legitimate skills and interests while attacking the externalized problem sorts that conflict out and frees energies to work on issues that otherwise get diverted to altering or maintaining the relationship.

The process starts by providing voice, allowing people to tell the story in their own way.

The mediator listens for values and interests and summarizes the story in those terms.

The focus establishes criteria to measure later possible outcomes against. This process is unique in that it allows disputants to view each others' context and perceptions as well as facts.

The mediation conference then focuses on testing possible elements of agreement, first in tentative and hypothetical terms, finally in future, concrete, actionable terms. Parties can see this progress through a very explicit, open process.

The mediator depersonalizes and rationalizes the dispute, breaks down antagonisms through neutral language and restatement. One researcher, Alan Orenstein calls this focusing skill "simultaneous translation." The mediator removes the emotional loading of a statement or question and rephrases it, capturing the substance in a form intended to enlist the receptivity of the listener.

Mediation works in part because it returns the focus of discussion to the common ground of the parties, the child's needs and experience.

What does mediation do well?

1. It moves disputing parties from conclusions or positions back to observations and values.

2. Mediated negotiations reduce the effect of raw power, politics or negotiation games on outcomes. How? In part, by creating the conditions for a rational and analytic reexamination of interests and positions. Tactically, mediators direct attention to the person who is most thoughtful, who creates the most options.

A word on power and empowerment: I think that a mediator temporarily suspends the effect that the distribution of power in the relationship would normally favor, and uses a temporary process authority to break up any logjam authority patterns may have contributed to the dispute.

3. By bringing teachers and therapists to the mediation, people who work with the child and have varied opinions, the mediator evokes new information, focuses and gives added weight to the person making the best observations and suggestions and breaks up "party line" thinking.

4. By conducting the mediation in a rational and analytic mode, norms are set which force out ill-considered and unsubstantiated decisions, unmasking unsupportable motives.

5. The mediated negotiation tends to assure that obligations are fairly represented.

6. A well-conducted mediation allows people time and opportunity to integrate changed circumstances into their value system.

7. The mediator focuses on the merits of the service request, not the identity of the parent.

Here are some common school mistakes in mediation:

1. Addressing the program description rather than discussing the child.

2. Assuming that the program speaks for itself.

"The program we are proposing has a 6:1 ratio, age 7 and 8 resource room with mainstreaming for non-academics."

That is a non-illuminating description. We need to discuss the child in lively, colorful, active, performance-related terms, citing accomplishments and sharing humor.

We need also to discuss programs in lively, illuminating, performance-related terms, which invite listeners to envision real children and real activities. We need to take a risk and predict outcomes.

Then people can make informed judgments.

3. School staff are sometimes tempted to prescribe solutions rather than work jointly with parents.

4. Failure to admit past mistakes. Failure to realize that admitting past mistakes demonstrates perspective, honesty and may serve to clear the air.

5. Using euphemisms or clinicisms when dealing with parents.

6. Assuming that all parents want the same thing.

7. Continuing to press a program after a parent has ruled it out.

8. Are not always aware of their resources to try something else.

9. Do not place enough weight or use as an early warning system a parent's suspicion that things are not working.

Here are some common parent errors in mediation:

1. Adopting a distant, clinical approach to their own child. This approach may mimic the professional posture of professional evaluators, but it misses an important aspect: people are motivated to act for many reasons including feelings.

2. Some people are so accustomed to feeling antogonistic that they cannot recognize or evaluate gains made in negotiation.

3. People are difficult to work with who know what they do not like, but who cannot compose a request for what they want. Some vision of the future is necessary for successful negotiation.

4. The most illuminating material for a mediator is the set of observations which led people to conclude that things were not "right." Parents sometimes share their conclusions better than their observations.

5. It may be an artifact of dealing with the elements of an institution that leads people to spend time guessing at others' motives. It is usually a waste of time.

6. Parents sometimes fail to discriminate between the impact of the school on their child separately from the impact of the school's dealings with them.

In closing, I'd like to comment on what I think the provision of mediation services to parents and schools improves.

1. Parents and schools have a better appreciation of each others' positions, regardless of outcome.

2. Negotiations skills of parents and schools are observed. Good practices are encouraged. Unhelpful, unethical practices are discouraged.

3. Schools and parents develop a greater awareness of rights and responsibilities and are exposed to consistent interpretation.

4. By helping to provide a routine forum for conflict, we may be changing attitudes toward conflict and conflict management.

BUREAU OF SPECIAL EDUCATION APPEALS

DECISION HISTORY

| DATES | TOTAL NO. OF DECISIONS | DECISIONS FAVORING PARENTS | DECISIONS FAVORING SCHOOL | SUBSTANTIALLY MODIFIED, DIFFERENT PLACEMENT, OR ORDER AGAINST THE DEPARTMENT OF ED. |
|---|---|---|---|---|
| 7/1/84 - 6/30/85 | 85 | 33 (38.8%) | 31 (36.5%) | 21 (24.7%) |
| 7/1/85 - 6/30/86* | 85 | 40 (47.1%) | 24 (28.2%) | 21 (24.7%) |
| 7/1/86 - 6/30/87 | 55 | 28 (50.9%) | 18 (32.7%) | 9 (16.4%) |
| 7/1/87 - 6/30/88 | 54 | 27 (50%) | 22 (40.74%) | 5 (9.26%) |

* David D. decision, setting "maximum feasible benefit" as the appropriate standard for special education under Chapter 766 and the Federal Education for the Handicapped Act, was decided by the First Circuit Court of Appeals on October 15, 1985. Bureau decisions issued after November 1, 1985 reflect the " maximum feasible benefit" standard.

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